BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SUZANN LEIGHTY	)	
Claimant	)	
VS.	)	
	)	Docket No. 216,983
AGING PROJECTS, INC.	)	
Respondent	)	
AND	)	
	)	
WAUSAU UNDERWRITERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and claimant request review of the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 13, 1998. Oral argument was held on June 12, 1998, in Wichita, Kansas.

APPEARANCES

Claimant appeared by her attorney, Brian D. Pistotnik of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Janell Jenkins Foster of Wichita, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Claimant raises the following issue for Appeals Board consideration:

What was claimant's average weekly wage on the date of accident?

Respondent raises the following issues for Appeals Board consideration:

1) Did claimant receive an underpayment of temporary total disability compensation?

2) Is claimant entitled to temporary total disability compensation while in work hardening during the period when claimant missed seven of sixteen work hardening sessions due to health problems?

3) What is the nature and extent of claimant's injury and/or disability?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, the Appeals Board makes the following findings of fact and conclusions of law:

Claimant was a part-time cook for respondent when, on November 22, 1995, she injured her back after falling while lifting a 50-pound box of potatoes. The pain was primarily in the middle of claimant's low back with radiculopathy down her right leg. Claimant was a part-time employee for respondent, and earlier was working as a part-time employee at Felts One Stop. However, claimant had notified Felts that, as of May 29, 1995, she no longer wished to work on a regular basis because of her commitment to a motel she and her husband had recently purchased. Thereafter, claimant was placed on an on-call status and was the last person on Felts' list to be called, only when Felts could find no one else to work.

Michael B. Felts, owner of Felts One Stop, testified that claimant advised him as of November 15, 1995, she no longer wished to work for Felts One Stop. Claimant disputes this, testifying that she remained on an on-call status with the employer. The evidence indicates claimant was only called approximately three times after the date of accident, with claimant refusing to work on two occasions because of her back. On a third occasion in the spring of 1996, claimant did work for approximately 6.25 hours.

The Administrative Law Judge found claimant's employment with Felts to be irregular and sporadic. In addition, claimant's status as an on-call fill-in worker did not constitute evidence of continued, regular, part-time employment as contemplated by K.S.A. 44-511(a)(4). The Appeals Board finds this is not a multiple employment situation as contemplated by K.S.A. 44-503a. Therefore, the denial of claimant's request to combine the wages from Felts One Stop with her average weekly wage is appropriate under these circumstances. Claimant's correct wage is $208.47 per week.

In so finding, the Appeals Board also affirms that part of the Award of the Administrative Law Judge that finds claimant received an underpayment of temporary total disability compensation. With an average weekly wage of $208.47, the compensation rate should have been $138.99, rather than $124.05 at which rate claimant was paid. With claimant receiving temporary total disability compensation for 25.51 weeks, this constitutes an underpayment of $381.12.

In addition, claimant was awarded an additional 3.75 weeks temporary total disability compensation while participating in work hardening. Respondent's request that claimant be denied temporary total disability compensation during the period of work hardening, when claimant missed seven of sixteen sessions, is denied. It is acknowledged claimant had some nonwork-related health problems separate from her back injury and was in the process of resolving these problems when she missed the work hardening sessions. This is not sufficient reason to deny claimant temporary total disability. The Appeals Board, therefore, finds that the Award granting the additional 3.75 weeks temporary total disability compensation is appropriate.

Claimant was examined and/or treated by three physicians who testified in this matter. Dr. David John Clymer, a board certified orthopedic surgeon, examined claimant at respondent's request on August 13, 1997. He described claimant as standing 5'4" and weighing 250 pounds and being clearly deconditioned. He diagnosed claimant with preexisting lumbar degeneration with disc space degeneration at L4-L5. He noted claimant had previously undergone a percutaneous discectomy and partial hemilaminectomy at L4-L5 and a fusion. Dr. Clymer felt additional surgical intervention would be inappropriate. He did indicate claimant had reached maximum medical improvement and, pursuant to the AMA Guides to the Evaluation of Permanent Impairment, rated claimant at 12 percent to the body as a whole of which 4 percent was considered preexisting from claimant's longstanding degenerative disc disease and mild spondylolisthesis at L4-5. He strongly recommended claimant lose weight, and improve her fitness and general activity. Dr. Clymer recommended restrictions of limited lifting, no more than 30 to 40 pounds, and suggested claimant avoid highly repetitive bending and lifting. When asked to define highly repetitive, he indicated 50 percent of the time or more would be more than he would recommend.

He was provided a list of thirty-one tasks from claimant's prior work history, and indicated claimant could not do one of the tasks. However, the Administrative Law Judge, in reviewing Dr. Clymer's evaluation of this task list, felt there were several additional tasks which claimant could not do, based upon the lifting limitations required of those tasks. The Appeals Board finds that K.S.A. 44-510e mandates that the extent of permanent partial general disability shall be "expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident . . . ." (Emphasis added.)

The Administrative Law Judge in revising the task loss opinion of Dr. Clymer has violated the mandate of K.S.A. 44-510e. Dr. Clymer identified only one of twenty-six tasks which claimant could no longer perform. Dr. Clymer's task loss opinion computes to 4 percent.

Claimant was also examined by Dr. Lawrence Richard Blaty, a specialist in the field of physical medicine and rehabilitation. Claimant was referred to Dr. Blaty by Dr. Abay, her neurosurgeon, on November 25, 1996. The purpose of the referral was for follow up physiatric intervention. The history provided Dr. Blaty of the accident was consistent with claimant's prior testimony. He diagnosed a post-operative L5-S1 discectomy, following a disc herniation. He recommended claimant see a physical therapist to work on flexibility and strengthening exercises. He felt claimant reached maximum medical improvement on March 7, 1997, at which time he released her with a 10 percent permanent partial functional impairment to the body as a whole pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. None of Dr. Blaty's 10 percent rating was due to the underlying spondylolisthesis. Dr. Blaty recommended claimant do no squat lifting over 30 pounds occasionally or 15 pounds frequently, no level lifting or carrying over 50 pounds occasionally or 25 pounds frequently, and recommended she do only occasional bending, squatting, or climbing. The Administrative Law Judge, after reviewing Dr. Blaty's deposition, found that he identified eleven of twenty-six tasks that claimant could no longer perform, which calculates to a 42 percent job task loss.

Claimant was referred to Dr. Daniel D. Zimmerman by her attorney on April 3, 1997. Dr. Zimmerman found claimant to have suffered a 17 percent permanent partial impairment to the body as a whole pursuant to the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition, which he felt was an increase over the preexisting impairment suffered by claimant from her degenerative conditions. In reviewing a list of twenty-six tasks, Dr. Zimmerman felt claimant could not do fifteen of the twenty-six tasks. This represents a task loss of 58 percent.

Giving approximately equal weight to each physician's opinion, the Appeals Board finds that claimant has suffered a task loss of 34 percent pursuant to K.S.A. 44-510e.

The second component of the work disability equation under K.S.A. 44-510e is a comparison of claimant's pre-injury average weekly wage with the post-injury wages claimant is earning after the injury.

Respondent contends that claimant violated the policies set forth in Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997), in that claimant failed to make a good faith effort to obtain post-injury employment. In addition, the respondent argues that claimant violated the policies set forth in Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995). In Foulk, the Kansas Court of Appeals held that a worker should not be awarded work disability benefits solely for refusing a job that the worker has the ability to perform. In this instance,

respondent offered claimant a job as a kitchen helper, working three hours per day at an hourly rate of $4.80 per hour, totaling $72.00 per week. Claimant rejected this position, arguing it did not pay a comparable wage, and later contended that it was not within her restrictions.

The Appeals Board finds after reviewing the offered job that it did violate claimant's restrictions and claimant's refusal to accept that job does not violate the policies set forth in Foulk.

However, the Appeals Board notes claimant's efforts at obtaining employment after leaving respondent are severely lacking. While claimant did attempt to return to work with respondent unsuccessfully, claimant's efforts away from respondent's employment are practically nonexistent. At the time of claimant's first regular hearing testimony on June 11, 1997, claimant acknowledged that she had applied for employment at only two locations in the previous six months. Claimant apparently was working with her husband at a motel that they had purchased. However, claimant went on to state that she was doing no work at the motel with the exception of minimal telephone answering and bookkeeping services.

At the continuation of regular hearing held June 20, 1997, claimant did acknowledge she had signed up for unemployment and since then had been attempting to obtain employment as is obligated under the Kansas Employment Act. However, the Appeals Board, viewing this evidence in light of claimant's minimal efforts between the injury of November 22, 1995, and the regular hearing held June 11, 1997, finds claimant has failed to make a good faith effort to obtain post-injury employment. Therefore, the policies set forth in Copeland, *supra*, obligate the fact finder to determine an appropriate post-injury wage based upon all the evidence before it, including expert testimony concerning the claimant's capacity to earn wages. In this instance, there is no expert opinion regarding claimant's ability, post-injury, to earn wages in the open labor market. However, in considering the evidence in the file, the Appeals Board notes claimant is not restricted by any medical doctor from performing full-time 40-hour per week employment. In addition, the restrictions placed upon claimant by the various doctors would not preclude claimant from earning a minimum wage, which would indicate claimant has the ability to earn $206 per week. The Appeals Board, therefore, will impute a post-injury wage of $206 to claimant. This computes to 99 percent of claimant's average weekly wage on the date of accident.

K.S.A. 44-510e(a) states in part:

> An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

Based upon K.S.A. 44-510e(a) and upon Copeland, *supra*, the Appeals Board finds claimant is limited to a functional impairment in this instance.

Dr. Blaty opined claimant had suffered a 10 percent impairment to the body as a whole based upon the AMA Guides to the Evaluation of Permanent Impairment, Fourth Edition. Dr. Zimmerman rated claimant at 17 percent to the body as a whole based upon the AMA Guides, Fourth Edition. Dr. Clymer felt claimant had an 8 percent impairment to the body as a whole based upon the AMA Guides. The Appeals Board finds claimant has suffered a 12 percent whole body functional impairment as a result of the injuries suffered while working for respondent on November 22, 1995.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Nelsonna Potts Barnes dated January 13, 1998, granting claimant a 71 percent work disability, should be modified, and an Award is granted in favor of the claimant, Suzann Leighty, and against the respondent, Aging Projects, Inc., and its insurance carrier, Wausau Underwriters Insurance Company, for an accidental injury sustained on November 22, 1995, and based upon an average weekly wage of $208.47 for a 12 percent permanent partial disability to the body as a whole.

Claimant is entitled to 29.26 weeks temporary total disability compensation at the rate of $138.99 per week totaling $4,066.85, followed by 48.09 weeks permanent partial disability compensation at the rate of $138.99 per week totaling $6,684.03, making a total award of $10,750.88.

As of November 25, 1998, the entire amount would be due and owing to claimant and ordered paid in one lump sum minus amounts previously paid.

Claimant is entitled to unauthorized medical up to the statutory maximum upon presentation of an itemized statement verifying same.

Future medical benefits will be awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

Claimant's attorney fee contract is approved, subject to the provisions of K.S.A. 44-536.

The fees necessary to defray the expense of the administration of the Workers Compensation Act are hereby assessed against the respondent and its insurance carrier to be paid as follows:

Ireland Court Reporting, Inc.	
Transcript of Regular Hearing	$438.20
Court Reporting Service	
Transcript of Continued Regular Hearing	$334.40
Deposition of Michael B. Felts	$205.20
Satterfield Reporting Service	
Deposition of Lawrence R. Blaty, M.D.	$331.00
Gene Dolginoff Associates, Ltd.	
Deposition of Daniel D. Zimmerman, M.D., P.A.	$373.00
Hostetler & Associates, Inc.	
Deposition of David John Clymer, M.D.	$324.50

IT IS SO ORDERED.

Dated this ____ day of February 1999.

_____
BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: Brian D. Pistotnik, Wichita, KS
Janell Jenkins Foster, Wichita, KS
Nelsonna Potts Barnes, Administrative Law Judge
Philip S. Harness, Director